

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNEL HOLLAND,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 264328

Wayne Circuit Court

LC No. 05-003714-02

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right following his bench trial conviction for assault with intent to rob while unarmed. MCL 750.88. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues the prosecution presented insufficient evidence to sustain his conviction. We disagree. We review an insufficiency of the evidence claim "in the light most favorable to the prosecutor and [determine] whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003).

Defendant was convicted of assault with intent to rob while unarmed for the assault against Michael Bowie. To prove assault with intent to rob while unarmed, the prosecution must show: (1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed. MCL 750.88; *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). "An assault with intent to rob being unarmed necessarily involves an attempt or offer to do corporal injury, with the present intention and *present ability* to carry out the offer. In other words, there *must* be a criminally assaultive act." (Emphasis in original.) *People v Sanford*, 402 Mich 460, 474 n 1; 265 NW2d 1 (1978).

The prosecution presented sufficient evidence to support defendant's conviction. The evidence showed Vaugh Hill and Michael Bowie were approached from behind as they waited for defendant's sister, Danielle Holland, to enter Hill's car. Hill and Bowie were on Lenox Street, at that particular time, because of Danielle. While Danielle pretended to enter the car, someone came up from the back of Hill's car, "snatched open" his car door and stabbed him. Another person approached the front passenger's side of the car where Bowie was seated. Both Hill and Bowie maintained someone fired a gun on that side. Although Bowie was unable to

identify his assailant, he maintained someone approached his side of the car and another man approached Hill's side of the car. According to Bowie, the assailant was trying to break his window with the butt of a gun and when he tried to escape, Danielle hit him in the head, and the other assailant opened the door and hit him on the shoulder. Bowie's shoulder was injured during the attack. Hill identified defendant as the assailant who approached the front passenger's side of the vehicle. Hill's personal items were also found at the house where defendant was arrested. Although Dajaun Dawson, a passerby, was unable to identify the assailants, he witnessed three people "come out of the dark" and "rush" a parked vehicle on Lenox. Dawson did not hear any gunshots, but witnessed two people being chased away from the vehicle.

The prosecution presented sufficient evidence to sustain defendant's conviction. Bowie was stuck in the shoulder by an assailant trying to rob him. Although Bowie was unable to identify his attacker, Hill identified defendant as Bowie's assailant. The attack on Bowie was sufficient to show an assault with force and violence, thus satisfying the first element necessary for defendant's conviction.

The evidence also showed defendant intended to rob from Hill and Bowie. A defendant's criminal intent can be inferred from the circumstances and facts surrounding the incident. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Defendant's intent to rob can be inferred from the actions of luring Hill and Bowie to a specific location and distracting them while he and another assailant attacked Hill and Bowie from behind. The actions of luring Hill and Bowie to that location, attacking them from behind and taking their property sufficiently satisfied the intent element of defendant's conviction.

The last element, defendant being unarmed, was also sufficiently demonstrated. Although Bowie and Hill maintained they heard a gunshot, the court, which functioned as the trier of fact, had reasonable doubt that a firearm was used. When the police conducted a search of the home where defendant was arrested, they recovered Hill's personal items but did not recover a weapon. Because the evidence regarding the use of a weapon was unreliable, the court determined no weapons were used during the assault. Moreover, Dawson corroborated Hill and Bowie's version of the events with the exception of hearing a gunshot. For that reason, the evidence was sufficient to support the conclusion that defendant was unarmed during the attack.

The prosecution sufficiently established all the elements necessary to prove assault with intent to rob while unarmed, i.e., that there was an assault with force and violence on Bowie, an intent to rob, and defendant being unarmed. *Chandler, supra*, p 614. Defendant's insufficiency of the evidence claim is without merit.

Defendant next argues he is entitled to resentencing for several reasons. We agree in part. Defendant did not preserve any of his sentencing issues for appellate review and, therefore, we review them for plain error. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

Defendant argues the trial court incorrectly scored his prior record variable six (PRV 6) at ten points. We agree. A sentencing court may score PRV 6 at ten points if the defendant is on "parole, probation, or delayed sentence status or bond awaiting adjudication or sentencing for a felony" offense. MCL 777.56(c). However, only five points may be assigned if the defendant is on "probation or delayed sentence status or on bond awaiting adjudication or sentence for a

misdemeanor” offense. MCL 777.56(d). The record shows, at the time of sentencing, defendant was on probation for third-degree retail fraud, MCL 750.356d(c)(4), a misdemeanor offense. This was defendant’s only prior conviction. Because defendant was on probation for a misdemeanor offense, rather than a felony offense, defendant’s PRV 6 should have been scored at five points, not ten. MCL 777.56(d).

Defendant’s PRV 6 score should be reduced to five points and his PRV total should be reduced to seven points. By reducing defendant’s PRV total to seven points his PRV level changes from level C to level B, which changes his minimum sentence guidelines range to 29 to 57 months, instead of 36 to 71 months. MCL 777.64. We remand for resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Defendant also argues that he is entitled to resentencing because the trial court incorrectly scored his offense variable one (OV 1), offense variable two (OV 2), and offense variable three (OV 3). Defendant argues the scoring is incorrect for at least two reasons: (1) the court made factual findings in violation of his constitutional right to a trial by jury and (2) the prosecution failed to prove he was legally responsible for his codefendant’s acts. We disagree.

Defendant’s claim that his sentence violates his constitutional right to a trial by jury, and the United States Supreme Court decisions in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), is without merit. Although, *Blakely, supra* at 301, held that factual determinations underlying the enhancement of sentencing maximums be made by a jury, our Supreme Court has concluded that *Blakely* does not apply to sentences imposed in Michigan. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). The Supreme Court found in *Drohan, supra*, p 164, that “[a]s long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” Because Michigan employs an indeterminate sentencing scheme, the Supreme Court found Michigan’s sentencing scheme does not offend a defendant’s Sixth Amendment right to a trial by jury. *Drohan, supra*, pp 163-164.

Defendant further argues, even if Michigan’s sentencing guidelines are unaffected by *Blakely*, he cannot be responsible for the actions of another. Defendant argues he cannot be sentenced for “acts of another without a jury determination beyond a reasonable doubt that [he] was also criminally responsible for those acts.” We disagree.

During sentencing the court found that defendant acted in concert with another person to rob Hill and Bowie and the evidence supported this conclusion as discussed *supra*. Because Hill was stabbed during a robbery that defendant participated in, the court assessed defendant’s OV 1 at 25 points, OV 2 at five points and OV 3 at ten points. We agree.

When determining defendant’s OV score, a sentencing court is permitted to “count each person who was placed in danger of injury or loss of life as a victim” of defendant’s actions. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). A defendant may be assessed 25 points for OV 1 if the victim was cut or stabbed with a knife. MCL 777.31(a). A defendant’s OV 2 may be assessed at five points if a stabbing weapon was used during the crime. MCL 777.32(1)(d). A defendant’s OV 3 can be scored at ten points if the victim requires medical attention. MCL 777.33(1)(d). The evidence showed that there were two victims of defendant’s

actions, Hill and Bowie. Hill was stabbed during the robbery and Bowie struck in the head and shoulder. Although defendant was not identified as Hill's assailant, defendant acted in concert with another to accomplish the robbery, which included the stabbing. Because Hill was stabbed with a weapon and needed medical attention for his injuries, the court properly assessed and scored defendant's offense variables. Because the trial court did not err in its scoring, defendant's claim is without merit.

Affirmed regarding defendant's conviction, but remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra